ULTIMATE ESSENCE SDN BHD

v.

NG KAM POH & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LEE HENG CHEONG J
[ORIGINATING SUMMONS NO: 24NCVC-571-03-2013]
27 FEBRUARY 2014

LAND LAW: *Caveat - Removal of caveat - Removal of caveat on part of land - Whether defendant had statutory right to enter caveat - Whether there was necessity to remove private caveat to effect transfer and subdivision of land - Whether there was need for defendant to give consent for transfer of land - Whether caveat affected other part of land or specific part of land - Whether transfer could still be affected*

The first purchaser bought a bungalow lot at Serendah Golf Villa ('the bungalow lot') erected on a part of land in Mukim Serendah ('the said land') from the developer *ie,* MK Associates Sdn Bhd (In Liquidation) ('MKA'). MKA was the registered owner of the said land. The full purchase price for the bungalow lot had been paid to MKA by the first purchaser and vacant possession of the bungalow lot was delivered to the first purchaser. Thereafter, the first defendant purchased the bungalow lot from the first purchaser pursuant to a sale and purchase agreement ('the bungalow lot's SPA') and a deed of assignment. The first defendant then paid the full purchase price to the first purchaser for the bungalow lot and the first purchaser delivered vacant possession to the first defendant. However, the said land had not been subdivided and individual titles had not been issued by the relevant land office. As such, the first defendant lodged a private caveat on the bungalow lot to protect his interest, rights and title in the bungalow lot. Neither MKA nor the liquidator had ever objected to the private caveat. Subsequently, MKA entered into a sale and purchase agreement with the plaintiff to sell the land including eight other pieces of land in Selangor and Wilayah Persekutuan ('the land's SPA'). The plaintiff's case in essence was that the first defendant should either remove the private caveat lodged against the said land or to provide a letter of consent to allow the plaintiff to transfer the said land to its name and consequently, consent to allow the plaintiff to apply for subdivision of individual title and upon verification of the first defendant's ownership, to transfer the same to the defendant. On the contrary, the first defendant contended that the plaintiff had no reasonable cause to commence this action. The first defendant further argued that the plaintiff's action was wrongful and unlawful both in law and in facts, and therefore frivolous and vexatious or otherwise an abuse of the process of the court.

Held (dismissing plaintiff's application with costs):

(1) Since MKA and the first purchaser had received their respective full purchase price, the first defendant had become the lawful and beneficial owner of the bungalow lot. MKA/liquidator held the bungalow lot as bare trustees and/or constructive trustees for the defendant. Thus, the first defendant was lawfully entitled to enter a private caveat pursuant to s. 323(1)(a) of the National Land Code ('NLC') to protect his right, interest and title in the bungalow lot pending the registration of the subdivided title into his name. (paras 9 & 16)

(2) The private caveat was lodged against a described and identified part of the land, namely the bungalow lot only pursuant to s. 323(3)(c) of the NLC. The entry of the private caveat pursuant to Form 19B against a part of a land merely required a description of the land affected which was sufficient for identification. The private caveat did not affect the other parts of the said land and the intended transfer of the said land by MKA/liquidator to the plaintiff. Thus, there was no necessity to remove the private caveat or for the first defendant to give consent for purpose of transfer of the land to the plaintiff or for subdivision of the land. (para 21)

(3) There was no provision in the NLC which stipulated that a caveator of a land was required to remove his caveat or to give consent in writing for the transfer of the plaintiff's interest in other part of the land. Further, s. 322(5A) of the NLC states that no consent was required from the caveator of a part of the land for the registration, endorsement or entry of any instrument not affecting the claim relating to that part of the land. (paras 23 & 25)

(4) The private caveat would not prohibit the application for subdivision of the said land. Section 136(1)(e) of the NLC states that the only persons or bodies who was required to give consent in writing for the application for sub-division are persons who are entitled to the benefit of a charge of the land, a lease of the whole or any part of the land, a charge of such a lease, or a lien over the land or any such lease. The first defendant did not fall within any of the categories of the persons required to give their consent in writing pursuant to s. 136(1)(e) of the NLC. (paras 34 & 36)

Case(s) referred to:

Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor [2011] 5 CLJ 136 FC ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***

Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Legislation referred to:
Local Government Act 1976, s. 160(1)
National Land Code, ss. 136(1)(e), 214(1)(a), 322(5)(b), (5A), 323(1)(a), (3)(c), 417

Other source(s) referred to:
Judith Sihombing, *The National Land Code: A Commentary*, vol 3, pp XX 1, XXV, 363, 432-480, 482, 690, XXVI 9

For the plaintiff - Ling Shih Shiun; M/s Leong & Megat
For the defendant - Liow Si Khoon (Jennifer Lai Sui Ting & MH Teo with him); M/s Liow & Co

Reported by Sandra Gabriel

JUDGMENT

Lee Heng Cheong J:

Introduction

[1] This is an application by way of an originating summons by the plaintiff for *inter alia* the removal of a private caveat lodged by the defendant *vide* Presentation No. 13946/2011 registered on 25 March 2001 on the land held under HS(D) 4329 (formerly known as HS(D) 2050), PT1391, and HS(D) 2052 PT1393 both in Mukim Serendah, Daerah Ulu Selangor, Negeri Selangor ("the said land") or an alternative order for the defendant to issue a letter of consent to the relevant land office to allow for the transfer of the said land to the plaintiff and subsequently for the plaintiff to apply for subdivision.

[2] The defendant purchased a bungalow lot known as Lot No. 17, Serendah Golf Villa Phase 2 ("the bungalow lot") erected on a part of the said land, pursuant to the sale and purchase agreement dated 27 January 1995 between the defendant and the first purchaser ("the bungalow lot's SPA") and the deed of assignment dated 20 June 1995 (See exh. BFTY-4 in the defendant's first affidavit in reply affirmed on 13 May 2013 ("defendant's first affidavit")). The first purchaser bought the bungalow lot from the developer, the MK Associates Sdn Bhd through the sale and purchase agreement dated 12 November 1981. (See exh. BFTY-5 in the defendant's first affidavit).

[3] MK Associates Sdn Bhd (In Liquidation) (Company No. 092826-H) ("MKA") is the registered owner of the said land. MKA then entered into a sale and purchase agreement dated 19 April 2012 with the plaintiff to sell the land including eight other pieces of land in Selangor and Wilayah Persekutuan (collectively "the land's SPA").

[4] The full purchase price for the bungalow lot had been paid to MKA by the first purchaser and MKA had delivered vacant possession of the bungalow lot to the first purchaser. The defendant has paid the full purchase price to the first purchaser and the first purchaser had also delivered the vacant possession to the defendant, upon completion of the bungalow lot's SPA.

[5] The said land has not been subdivided and individual titles have not been issued by the relevant land office.

[6] The defendant lodged a private caveat on the bungalow lot on or about 25 March 2011, bearing Presentation No. 13946/2011 ("private caveat") to protect his interest, right and title in the bungalow lot. Neither MKA nor the liquidator has ever objected to the private caveat.

The Plaintiff's Case

[7] The plaintiff's case in essence is that the defendant should either remove the private caveat lodged against the said land or to provide a letter of consent to allow the plaintiff to transfer the said land to its name and consequently, consent to allow the plaintiff to apply for subdivision of individual title and upon verification of the defendant's ownership, to transfer the same to the defendant.

The Defendant's Case

[8] The defendant contends that the plaintiff has no reasonable cause to commence this action against the defendant which is unsubstantiated and unsustainable. The defendant further contends that the plaintiff's action is wrongful and unlawful both in law and in fact, and therefore frivolous and vexatious or otherwise an abuse of the process of the court.

Consideration Of The Pertinent Issues

[9] This court finds that the defendant has statutory right to enter the private caveat as the defendant has a registrable and caveatable interest by virtue of the bungalow lot's SPA which is completed and valid thus binding and enforceable. Since MKA and the first purchaser has received their respective full purchase price and in law, the defendant has become the lawful and beneficial owner of the bungalow lot. Furthermore the first purchaser had also delivered vacant possession of the bungalow lot to the defendant, and the defendant has been in possession of the bungalow lot since 1995 and has remained in possession of the same until today with the full knowledge and consent of MKA and the liquidator. In the light of the circumstances of the case, MKA/liquidator holds the bungalow lot as bare trustees and/or constructive trustees for the defendant.

[10] In *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 1 LNS 175, the court held *inter alia*:

> The law is clear that the vendors, **after receipt of the full purchase price** and **surrender of possession of the lands** to the appellants **is bare trustees** for the appellants of the said land and it must consequently follow, as night must day, that the vendors has no interest in the lands which can be the subject matter of a caveat. (emphasis added)

[11] Further, the court observed as follows:

> We are in agreement with the majority view in *Karuppiah Chettiar v. Subramaniam* [1971] 1 LNS 43 at p. 117 where it was held:
>
> (1) in this case Mohamed Sharjudin having **sold his entire interest** in the land and **received payment in full held** the legal estate **only as a bare trustee for the respondent**, who was the **equitable owner**. (emphasis added)

[12] In *Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals* [1994] 3 CLJ 20, the court held *inter alia* that:

> It is an **old and well-settled rule in equity** that under a valid contract for sale of land, the beneficial ownership of the land passes to the **purchaser** who **becomes the equitable owner**, the vendor having a right to the purchase money for which he has a lien on the land ... **When the full purchase price is paid, the vendor** becomes **a bare trustee ie unqualified trustee for the purchaser**. (emphasis added)

[13] In *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011] 5 CLJ 136, the facts which is somewhat similar to the present case. There, the plaintiffs purchased from the defendants' late father, a certain portion ('said portion') of land in Johor Bahru ('said land') *vide* a deed of sale and entered into possession of the said portion. The plaintiffs lodged a private caveat on the said land when the defendants refused to transfer the said portion to them. The salient terms of the agreement is as follows:

> Clause 2 of the agreement provides that the **purchasers, upon payment of the stipulated sum, shall has possession and occupation** of the property and shall be at liberty to use the same, in any manner they choose and deem fit and to execute **all rights of exclusive ownership** of the said portion of the property. And under cl. 3, the **vendor is to surrender** to the purchasers the **said portion** forthwith. (emphasis added)

[14] His Lordship Arifin Zakaria CJ (Malaya) (as he then was) in delivering the judgment *inter alia* held as follows:

> The learned (High Court) judge further held that the plaintiffs pursuant to the deed of sale **had acquired rights *ad rem*** over **the said portion pending registration of the said portion** by the vendor and by devolution, the defendant hold the said potion **as constructive trustee** for the plaintiffs. (emphasis added).

[15] In the circumstances of the present case, since the developer, MK Associates has given consent to the deed of assignment between the defendant and the first purchaser in the bungalow lot's SPA, in the consent endorsement which para. 2 of the consent endorsement states as follows:

> We undertake to deliver the individual issue document of title to the said Property immediately upon its issuance and the valid and registrable memorandum of transfer duly executed by us in favour of the Assignee ...

[16] Since the defendant is the beneficial owner of the bungalow lot and MKA/liquidator only holds the bungalow lot as bare and/or constructive trustees for the defendant, the defendant is lawfully entitled to enter a private caveat pursuant to s. 323(1)(a) National Land Code, to protect his right, interest and title in the bungalow lot pending the registration of the subdivided title into his name.

[17] Section 323(1)(a) National Land Code states as follows:

> (1) The persons and bodies at whose instance a private caveat may be entered is:
>
> (a) any person or body **claiming title to**, or any registrable interest in, any alienated land or undivided shares in any alienated land or any right to such title or interest. (emphasis added)

[18] In the textbook *The National Land Code; A Commentary* by Judith Sihombing, vol. 3, at p. XXV 482, para. [3355]-[3400] and [3401] states as follows:

> A **caveatable interest** is one which either **claims title** to or a registrable interest in land ... It gives its holder an immediate right, or will on completion of the underlying transaction, to has a substantive entry made on the register, ie registration of a dealing in statutory form; for example the interest of **a purchaser of land, who has paid all purchase money**, receives a transfer in registrable form with the IDT (issue document of title). But the **right to caveat** most usually arises **before the caveator is in a position to register**. That **preliminary interim protection is the whole purpose underlying the caveat system**.

> The words: (1) **'title'** ... in alienated land' refer to the statutory or legal estate and illustrate that the **claimant expects to become the proprietor** of the land on completion of the transaction behind the caveated claim. **It is an interest** which is supported by consideration and it **results from** the entry into **a valid and enforceable contract of sale** ... (emphasis added)

[19] Further at p. XXVI 9, para. [54], the said textbook further states:

> Whilst several local decisions has said that the **vendor holds as bare trustee for the purchaser** ... this only occurs **when the purchaser has paid the purchase price in full** ... the Torrens system provides for one estate only, ie the statutory estate. Thus any 'equitable' estate received by the purchaser is clearly 'off the register'; in its place the Code would treat it as a claim to an **unregistered-but-registrable** interest **which is entitled to be caveated** and so goes on the register by way of the caveat. On registration of the transfer in statutory form the purchaser will become the holder of the statutory estate. (emphasis added)

[20] Further *The National Land Code: A Commentary* vol. 3, at p. XXV 609, para. [2601] states as follows:

> Since Private Caveat does not alter the ownership of the land or interest, and merely acts **to give notice of** and **priority to the claim**, any number of private caveats can be entered on the title and all give priority in the temporal order of endorsement (emphasis added).

[21] This court finds that there is no necessity to remove the private caveat or for the defendant to give consent for purpose of transfer of the land (excluding the bungalow lot) to the plaintiff or for subdivision of the land as the private caveat is lodged against a described and identified part of the land, namely the bungalow lot only, pursuant to s. 323(3)(c) National Land Code. The entry of the private caveat pursuant to Form 19B against a part of a land merely required a description of the land affected which is sufficient for identification.

[22] Section 323 National Land Code which deals with "applications for entry of private caveats" states as follows:

> (3) Any application under this section shall be accompanied by:
>
> (a) the prescribed fee;
>
> (b) the grounds giving rise to the claim thereto, verified by a statutory declaration by the applicant or his advocate and solicitor; and
>
> (c) **if relating to a part of the land, a description** or a plan **of the land affected**, and if relating to an undivided share in the land or a part thereof, a description, **which is sufficient for identification**. (emphasis added)

[23] Thus this court finds that the private caveat does not affect the other parts of the said land and the intended transfer of the said land (excluding the bungalow lot belonging to the defendant) by MKA/ liquidator to the plaintiff. This court further agrees with the defendant's contention that there is no provision in the National Land Code, which stipulates that a caveator of a land is required to remove his caveat or to give consent in writing for the transfer of the plaintiff's interest in other parts of the said land (excluding the bungalow lot which has been caveated) or for the purpose of sub-division of the said land.

[24] The only reference to the consent of a caveator in the National Land Code is to be found in s. 322(5)(b). However, this court is of the view that this particular section is not applicable to the defendant's case herein because s. 322(5)(b) is in relation to a private caveat which seeks to bind the whole of the land, whereas the private caveat only seeks to bind a part of the said land which is only the bungalow lot.

[25] This court finds that s. 322(5A) of the National Land Code is directly applicable to the defendant's case which specifically refers to a private caveat entered on a part of the land. Section 322(5A) National Land Code, clearly states that no consent is required from the caveator of a part of the land for the registration, endorsement or entry of any instrument not affecting the claim relating to that part of the land.

[26] Section 322 National Land Code deals with the "Nature and effect of private caveats" and states as follows:

> (5A) **No consent of the person** or body at whose instance a **private caveat** has been **entered on a part of the land**, an undivided share in the land or a particular interest therein **is necessary to effect any registration**, endorsement or entry of any instrument on the register document of title **not affecting the claim relating to that part of the land, undivided shares in the land** or interest therein. (emphasis added)

[27] This court finds support in *The National Land Code: A Commentary* at p. XXV 363, at para. [2404] which states as follows:

> The insertion of **subsection 5A** seeks to reflect the fact that **only part** (of the Land) **is being bound** (by the caveat) by providing that **no consent of the caveator is required** in respect of a transaction **not affecting that part** of the land. (emphasis added)

[28] *The National Land Code: A Commentary* at p. XXV 432-480 at para. [3301.1] states that subsection 5A was inserted as follows:

> ... with the intention of dealing with caveats, which seek to **bind part only of the land** or an undivided shares in the land. This amendment is in conjunction with those to subsections (1) and (2) (of section

322). The effect of all these amendments is that a **caveat to bind part of the land** or an undivided share only, actually binds the whole of the land or undivided shares. **However, when an application to effect registration** of a competing instrument or entry of a competing interest, then **no consent is required** if the **subject part of the land** or undivided shares **is not being affected**. To support this amendment, a substituted section 323(3) of the Code is also included to provide for a plan of the land showing the affected part or a description of the undivided part to accompany the application for entry of the caveat. (emphasis added)

[29] Thus this court finds that since the private caveat in the present case, is lodged against a part of the said land under s. 323(3)(c) NLC, which sought to bind or affect only a part of the said land, *viz* only the bungalow lot, the registration of the plaintiff's instrument of transfer ought to be in respect of the other uncaveated parts of the said land. Thus pursuant to s. 322(5A) National Land Code, no consent is necessary or required from the defendant for such registration as this does not affect the defendant's claim, which relates only to a part of the said land ie, the bungalow lot, which has been caveated.

[30] This court is in agreement with the contention of defendant that it is common practice among conveyancing solicitors that a part of the land can be transferred, notwithstanding s. 214(1)(a) National Land Code, provided that the transferor/vendor:

(a) transfers the part of the land which he intends to sell, to the purchaser (as transferee); and

(b) transfers the part of the land which he is not selling, back to himself (as the other transferee).

[31] Further guidance can be found in *The National Land Code: A Commentary* on how a part or portion of the land can be transferred. *The National Land Code: A Commentary* at Chapter XX p. XX 1 comments on s. 214(1)(a) National Land Code as follows:

[3] The effect of this subsection is that it is not possible to transfer a part of land or a part of a share of alienated land. **To overcome this prohibition**, where a **registered proprietor wishes to transfer** a share in or **part of the land**, the practice has been **to transfer the whole of the land to the transferee and the transferor qua transferee for both to hold as co-proprietors** in undivided shares. (emphasis added).

[32] In the Federal Court decision of *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* (*supra*) Tun Arifin Zakaria CJ in delivering the judgment of the abovementioned case, said that the vendors (defendant in that case) can and must in law hold a portion (as undivided share) of the land which they have sold to the purchasers (plaintiffs in that

case), and directed a Registrar's caveat to be entered to prevent the vendors from re-selling or transferring the purchasers' portion to anyone else apart from the purchasers. Tun Arifin Zakaria CJ, *inter alia* held that:

> Accordingly, I would direct that the Registrar's Caveat be entered against the said land to the effect that the Defendant, as **registered proprietors, hold 21000/84398 undivided shares in the said land** as **constructive trustees** for the plaintiffs, his successors in title or assigns. (emphasis added)

[33] Thus the principles laid down in the above authorities strongly suggested that those parts or portions of the said land which are unsold and not caveated, can be transferred to the plaintiff, while the bungalow lot that has been sold by MKA and caveated by the defendant, ought to be transferred back into the name of MKA/liquidator, who would thereafter transfer the same to the defendant, upon issuance of the individual titles.

[34] This court also finds that the private caveat would also not prohibit the application for sub-division of the said land. The conditions for approval of sub-division pursuant to s. 136(1)(e) National Land Code clearly states that the only persons or bodies who is required to give his consent in writing for the application for sub-division, are persons who are entitled to the benefit of (a) a charge of the land; (b) a lease of the whole or any part thereof; (c) a charge of such a lease; or (d) a lien over the land or any such lease.

[35] Section 136(1)(e) National Land Code which deals with "conditions for approval of sub-division" states as follows:

> (1) No sub-division shall be approved by the State Director or, as the case may be, Land Administrator unless the following conditions is satisfied:
>
> ...
>
> (e) that every person or body who, at the time when the approval was applied for, was entitled to the benefit of:
>
> (i) **a charge** of the land,
>
> (ii) **a lease** of the whole or any part thereof, other than a part corresponding precisely to one of the proposed sub-divisional portions,
>
> (iii) **a charge of such a lease**, or
>
> (iv) **a lien** over the land or any such lease, **has consented in writing** to the making of the application. (emphasis added)

[36] This court finds that the defendant does not fall within any of the categories of the persons required to give their consents in writing pursuant to s. 136(1)(e) National Land Code.

[37] The plaintiff contends that the defendant ought to have proceeded to commence action to enforce his right after entering the private caveat but instead did nothing. This court finds that there is no obligation on the part of the defendant to commence any legal action against MKA/ liquidator to enforce his right, interest and title to the bungalow lot for the following reasons:

(a) MKA, the registered owner of the said land, had acknowledged that the defendant has a binding, concluded and enforceable contract and had surrendered vacant possession of the bungalow lot to the defendant *vis-à-vis* the first purchaser. The defendant has been in possession of the same since 1995 until today with the full knowledge and consent of MKA as well as the liquidator;

(b) MKA had also acknowledged the absolute beneficial interest of the defendant and had dutifully submitted the defendant's name and particulars of the bungalow lot to Majlis Daerah Hulu Selangor to inform Majlis Daerah of the change of ownership pursuant to s. 160(1) of the Local Government Act 1976, for the purpose of issuance of the assessment notice for the bungalow lot, directly to the defendant; and

(c) Both MKA and the liquidator has all these years since 1995 never disputed the defendant's right, interest and claim to the bungalow lot.

[38] The defendant has drawn this court's attention to the "general authority of the court" in s. 417 National Land Code which reads as follows:

> 417. General authority of the Court.
>
> (1) The Court or a Judge **may** by order **direct the Registrar or any Land Administrator** to do all **such things as may be necessary to give effect to any judgment or order** given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith. (emphasis added)

Order

[39] In the light of this court's above findings, this court dismisses the plaintiff's application against the first defendant with costs and no order for costs is made against the second defendant.

A **[40]** This court finds that s. 322(5A) and s. 136(1)(e) of National Land Code are directly applicable to the facts of the present case and the private caveat shall maintain on the said land without the need for the defendant to remove the same or grant consent, for the requisite registration and sub-division at the land office.

B **[41]** The Director/Registrar/Land Administrator of the PTG Selangor pursuant to s. 417 of NLC is hereby ordered to forthwith give effect to the order granted herein.

C

D

E

F

G

H

I